

RECOVERY OF COSTS IN EXPROPRIATIONS: POLICY AND REALITY
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Introduction

The entitlement of expropriated owners to recover their reasonable legal costs is a vital component of the compensatory scheme under the *Expropriations Act*.² This entitlement permits parties subject to expropriation to have access to professional expertise to ensure that they receive fair compensation arising from the expropriation and gives those who seek additional compensation the means to access justice with the support of professional advice and assistance.

The discussion below will address the policy behind the costs rule in Ontario, its application under the *Expropriations Act*, practical considerations for both claimants and respondents to ensure the fair recovery of costs and suggestions for improving the fairness and certainty of recovering costs under the *Expropriations Act*.

Policy Considerations for the Recovery of Costs

The often used phrase “no one ever asked to be expropriated” is a logical starting point for approaching a scheme for fair compensation following the expropriation of privately held property. This statement is logically supported by the reality that if one wishes to

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² *Expropriations Act*, R.S.O. 1990, c. E. 26, as amended [the “*Expropriations Act*” or the “*Act*”].

part with property he or she is free to do so voluntarily and, most likely, would have already done so before a public authority acquires land or other interests under the compulsion of statute. The interference with private property rights is, however, justified by the fact that a public authority expropriates property when it is required for the public interest.

In order to balance the public interest with the rights of private landowners, the law of expropriation has evolved to provide the dispossessed owner with compensation similar to the consideration a private landowner would objectively require to voluntarily part with his or her property.³ This concept has also been explained as affording the private land owner, who has been subject to the expropriation of property, with full and fair compensation.⁴ An owner of property should not be prejudiced by an expropriation or placed in a worse position than the owner would have been in but for the expropriation. In support of this principle, Mr. Justice Rand, writing for the majority of the Supreme Court of Canada in *Diggon-Hibben Ltd. v. R.*,⁵ wrote:

A compensation statute should not be approached with the attitude that Parliament intended an individual to be victimized in loss because of the accident that his land rather than his neighbour's should be required for public purposes:....⁶

³ Eric C. E. Todd, *The Law of Expropriation and Compensation in Canada*, 2nd ed. (Toronto: Carswell, 1992) at 2.

⁴ *Dell Holdings Ltd. v. Toronto Area Transit Operating Authority* (1997), 60 L.C.R. 81 at 88 and 89 (S.C.C.).

⁵ *Diggon-Hibben Ltd. v. R.*, [1949] 4 D.L.R. 785 (S.C.C.).

⁶ *Ibid.* at 788.

The approach to compensation articulated by Mr. Justice Rand has been carried forward and applied to modern expropriation statutes through courts and tribunals giving a broad and liberal interpretation to expropriation statutes, which are to be strictly construed in favour of those whose rights have been affected.⁷

This approach is, of course, tempered by the fact that the interests of the owner to full compensation must be balanced with the interests of the public in the achievement of its goals. This balancing requires rational limits to an owner's entitlement to compensation and was articulated in the *Report of the Ontario Law Reform Commission on the Basis of Expropriation*,⁸ as follows:

While we urge that the owner should receive full indemnity for his loss, however, we are in no case suggesting that he should receive more than that amount. He should not reap a windfall, nor should he recover for losses which are highly speculative or uncertain. The public purse is also to be protected, and we are convinced that if excessive compensation were paid the cost of public works might well increase to such an extent that further projects would be curtailed because of insufficient funds.⁹

An expropriated owner must have access to a judicial mechanism for the determination of compensation in order to facilitate the achievement of full and fair compensation. As the determination of full and fair compensation under the *Expropriations Act* is usually an intricate and complicated process that requires the support of expert evidence and analysis, owners often require the assistance and services of legal counsel, appraisers, business loss experts, planners and numerous other professionals with expertise in areas

⁷ *Dell Holdings v. Toronto Area Transit Operating Authority*, *supra* note 4 at 88 and 89.

⁸ *Report of the Ontario Law Reform Commission on the Basis for Compensation on Expropriation* (Toronto: Queen's Printer, 1967) ["*Law Reform Commission Report*"].

⁹ *Ibid.* at 10.

relevant to their claim for compensation. The *Law Reform Commission Report* recognized the importance of an expropriated owner having an entitlement to the recovery of costs in the process of determining compensation under the *Expropriations Act* as follows:

Approaching the costs problem from the indemnity aspect, there is no reason why the claimant should not be fully compensated for his legal and appraisal expenses. It is not the same situation that exists where two private litigants are engaged in a contest before the courts and where costs, in all likelihood, will be paid by the loser or the winner. Here, the state has intervened and injured one of its subjects in the enjoyment of his property. Since the purpose of compensation is to make the expropriated owner economically whole, he should be fully reimbursed for the legal and appraisal costs incurred. ...

Certainly, in expropriation cases, claimants should not be placed in a position where they are afraid to consult the legal profession because they are apprehensive of the cost. The same applies to seeking the advice of an appraiser. People should be placed in a position which gives them the freedom of action in seeking advice. In this way, they will be more likely to feel fairly treated and that the Expropriating authority has not taken advantage of them.¹⁰

The indemnification of an expropriated owner's legal costs by an expropriating authority not only increases the likelihood of the expropriated owner having access to justice, but also ensures that the owner is fully compensated for the expropriation and does not have to go out of pocket for the costs of the compensation process. Adopting this rationale, the *Expropriations Act* entitles expropriated owners to their reasonable legal, appraisal and other costs for the determination of compensation,¹¹ as will be discussed in further detail below.

¹⁰ *Ibid.* at 39.

¹¹ *Expropriations Act*, *supra* note 2, Section 32(1).

The recovery of an expropriated owner's costs for the determination of compensation is itself considered part of an owner's compensation.¹² This principle was articulated by the Honourable J. C. McRuer in the *Royal Commission Inquiry Into Civil Rights Report*,¹³ one of the foundations for the *Expropriations Act*:

The expenses incurred by an owner for solicitors' and valuers' fees are elements to be considered in determining a basis of compensation where land has been expropriated. This matter has been the subject of a reference to the Ontario Law Reform Commission [as set out above] and has been dealt with in its report. [Citations omitted].¹⁴

The Ontario Municipal Board and the courts have recognized that an owner's costs are an element of compensation.¹⁵ At times, this recognition has taken the form of courts finding that the costs of a costs assessment are subject to the costs provisions of the *Expropriations Act*, as the determination of costs is a determination of compensation. Implicit in the recognition of costs being an element of compensation is the fact that the recovery of costs by an owner is a critical element of the compensation process and ensuring that an expropriated owner is made whole.

Section 32 of the *Expropriations Act*

The mechanism for the recovery of costs by claimants in expropriations is set forth in Section 32 of the *Expropriations Act*, which reads as follows:

¹² *Marshall v. Ontario (Minister of Transportation)* [2005], O.M.B.D. 530, decision of S.W. Lee, Decision No. 1170, May 6, 2005; *The Law of Expropriation and Compensation in Canada*, *supra* note 3 at 393.

¹³ The Honourable James Chambers McRuer, *Royal Commission (Ontario), Inquiry Into Civil Rights*, Report 1, Vol. 3 (Toronto, Queen's Printer: 1968) ("*Ontario Royal Commission Report*").

¹⁴ *Ibid.* at 1061.

¹⁵ *Marshall v. Ontario (Minister of Transportation)*, *supra* note 12; *Eddie v. Outen (No. 3)* (1976), 10 L.C.R. 92 (Ont. S. C.), *Shriner v. Municipality of Metropolitan Toronto (No. 2)* (1972), 3 L.C.R. 101 (Ont. S. C.), *Madsen v. Municipality of Metropolitan Toronto* (1970), 1 L.C.R. 27 (Ont. C.A.).

32. (1) Where the amount to which an owner is entitled upon an expropriation or claim for injurious affection is determined by the Board and the amount awarded by the Board is 85 per cent, or more, of the amount offered by the statutory authority, the Board shall make an order directing the statutory authority to pay the reasonable legal, appraisal and other costs actually incurred by the owner for the purposes of determining the compensation payable, and may fix the costs in a lump sum or may order that the determination of the amount of such costs be referred to an assessment officer who shall assess and allow the costs in accordance with this subsection and the tariffs and rules prescribed under clause 44 (d).

(2) Where the amount to which an owner is entitled upon an expropriation or claim for injurious affection is determined by the Board and the amount awarded by the Board is less than 85 per cent of the amount offered by the statutory authority, the Board may make such order, if any, for the payment of costs as it considers appropriate, and may fix the costs in a lump sum or may order that the determination of the amount of such costs be referred to an assessment officer who shall assess and allow the costs in accordance with the order and the tariffs and rules prescribed under clause 44 (d) in like manner to the assessment of costs awarded on a party and party basis.

The provisions of Section 32 of the *Act* incorporate regulations promulgated under Section 44 of the *Act*,¹⁶ which read as follows:

1. (1) The amount of legal, appraisal and other costs shall be in the discretion of the assessment officer to be determined *quantum meruit* and in assessing, the officer may reduce the amount of, or disallow, any item of cost upon the ground that the same was not reasonable in amount or was not reasonably incurred.

(2) Subject to subsection (1), legal costs shall be assessed, *quantum meruit*, by the assessment officer as on an assessment of costs as between a solicitor and his or her own client.

Under Section 32 of the *Act*, the owner's entitlement to recover costs that are "actually incurred"¹⁷ from the expropriating authority is mandatory, subject to the following:

1. **The "85% Rule"**, which provides that an owner's recovery of costs will be ordered so long as the compensation awarded by the Board for all heads of damages under the *Expropriations Act* is at least 85% of the initial offer of

¹⁶ R.R.O. 1990, reg. 364, as amended by O.Reg 332/92, s.1.

¹⁷ The phrase "actually incurred" is given a broad meaning to include accounts that have been rendered even if they are not paid. See *Corporation of the City of Windsor v. Teshuba*, unreported decision of Nolan J., September 7, 2005, Court File No.: 04/CV/3750.

compensation provided without prejudice to the owner by the expropriating authority.¹⁸ For example, if an owner is provided \$100.00 as an initial payment for the market value of the lands taken and ultimately recovers a total award of \$86.00 for all damages including market value, the owner's entitlement to costs is triggered.

2. **Costs must be for the determination of compensation.** This includes the owner's costs in all aspects of compensation proceedings, negotiations and attendances before the Board of Negotiation.¹⁹ Other costs that have been found to be recoverable include: steps taken to resolve title problems where the issue must be resolved in order to determine the quantum of compensation,²⁰ the consideration of decisions from an arbitration and whether an appeal is appropriate,²¹ and steps taken to assess costs owing under the *Expropriations Act*.²² Costs that are not recoverable, as they do not fall within the definition of "determining compensation", include steps taken to resist an impending expropriation or contest its validity,²³ an attendance before an Inquiry Officer at a Hearing of Necessity,²⁴ and steps taken to

¹⁸ The initial without prejudice offer by the expropriating authority is not necessarily limited to the compensation that must be paid under Section 25 of the *Expropriations Act*. Decisions of the Ontario Municipal Board have not been perfectly consistent in defining the meaning of "the amount offered", on which the 85% Rule is based, as is discussed at page 20, *infra*.

¹⁹ Mark M. Orkin, *The Law of Costs*, 2nd ed. (Toronto: Canada Law Book, 2002) at 2-233.

²⁰ *Campbell v. Peel Board of Education* (1981), 24 L.C.R. 60 at 67 and 68 (Ont. L.C.B.).

²¹ *Ridgeport Developments v. Metropolitan Toronto and Region Conservation Authority (No. 2)* (1977), 12 L.C.R. 141 at 143 (Ont. Assessment Officer).

²² *Marshall v. Ontario (Minister of Transportation)* *supra* note 12; *The Law of Expropriation and Compensation in Canada*, *supra* note 3 at 393.

²³ *Kohlbrich v. Ministry of Housing* (1981), 23 L.C.R. 1 at 4 (Ont. Assessment Officer).

²⁴ Section 7(10) of the *Expropriations Act* states that the costs award to an owner for a Hearing of Necessity is not to exceed \$200.00.

resolve the division of compensation between various owners having an interest in the compensation award.²⁵

3. **Costs must be “reasonable”.** The majority of disputes concerning costs arise as a result of differing views as to what costs are “reasonable”. Needless to say, the determination of what is “reasonable” is based on subjective considerations and can only be assessed on a case-by-case basis.

The *Rules of Civil Procedure*²⁶ articulate factors to be considered in the assessment of fees and the determination of “reasonableness” in Rule 58.06(1) which reads as follows:

- 58.06 (1)** In assessing costs the assessment officer may consider,
- (a) the amount involved in the proceeding;
 - (b) the complexity of the proceeding;
 - (c) the importance of the issues;
 - (d) the duration of the hearing;
 - (e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
 - (f) whether any step in the proceeding was,
 - (i) improper, vexatious or unnecessary, or
 - (ii) taken through negligence, mistake or excessive caution;
 - (g) a party’s denial of or refusal to admit anything that should have been admitted; and
 - (h) any other matter relevant to the assessment of costs.

These factors have been taken into consideration by assessment officers in the determination of costs under the *Expropriations Act*.²⁷ In *Reed v. Regional Municipality*

²⁵ *Moto-Match Centres Ltd. v. Municipality of Metropolitan Toronto (No. 2)* (1985), 32 L.C.R. 289 at 292 (Ont. Assessment Officer).

²⁶ *Rules of Civil Procedure*, R.R.O. 1990, reg. 194, as amended.

²⁷ See e.g. *Mikalda Farms Limited v. Regional Municipality of Halton* (1998), 67 L.C.R. 138 at 142 (Ont. Assessment Officer).

of *Halton*²⁸ the following factors were set out as considerations for an Assessment Officer's determination of reasonable costs:

1. The value of the services rendered;
2. The reasonable time spent in producing a relevant and useful report or opinion;
3. The monetary value of the compensation determined;
4. The degree of skill and competence demonstrated by the professional;
5. The duplication of efforts;
6. The under utilization of junior staff or the over utilization of senior professionals who charge higher fees;
7. Excessive charges for travel or waiting time, which are generally permitted at only a half rate;
8. Reductions for the "learning curve", which may apply to professionals with modest experience in the area of expropriation;
9. Time spent unnecessarily, indiscriminatingly or for repetitive tasks; and
10. Excessive hourly rates, which are not substantiated by the market.²⁹

The actual retainer between the client and the professional is another important fact which is considered in an assessment. Fee estimates and increases to hourly rates charged must be brought to the client's attention and authorized by the client.³⁰ Proper

²⁸ *Reed v. Regional Municipality of Halton*, unreported decision of Assessment Officer Brzyski, February 7, 1994 at 3 to 8.

²⁹ *Ibid.* at 3 to 8. See also *Cohen v. Kealey & Blaney* (1985), 26 C.P.C. (2d) 211 (Ont. C.A.).

³⁰ *Mikalda Farms Limited v. Regional Municipality of Halton*, *supra* note 27 at 147; *Airport Corporate Centre Inc. v. Minister of Transportation*, unreported decision of Assessment Officer Brzyski, dated May 2, 1996 at 18 and 19.

disclosure of expert reports, opinions and analyses is also essential. Disclosure of the existence of an opinion, report or analysis must be made in accordance with the disclosure requirements of the *Rules of Practice and Procedure* of the Ontario Municipal Board and the *Rules of Civil Procedure* even if the expert's work is not ultimately relied upon at the hearing or even produced to the opposing party.³¹

In certain instances value is derived from an expert analysis even if it is not relied upon at the compensation hearing, as the analysis may be necessary to determine the merits of a potential claim or the quantum thereof. In such a case, however, the existence of the expert report or opinion should be disclosed in Schedule B of a party's Affidavit of Documents (privileged documents), even though the report or the contents thereof remains privileged and exempt from any requirement to produce to the other side. The Ontario Court of Appeal in the decision of *Tripp v. Ontario (Minister of Transportation)*,³² denied the costs of an expert report that was not relied on at the hearing and was not disclosed in an Affidavit of Documents, as was required under the *Rules of Civil Procedure*. This demonstrates an example of how the failure to adhere to the *Rules of Civil Procedure* and the *Rules of Practice and Procedure* of the Ontario Municipal Board can ultimately prejudice a claimant's ability to recover costs.

³¹ See Rule 31.06 of the *Rules of Civil Procedure*, R.R.O. 1990, reg. 194, incorporated by reference into the procedure for the Ontario Municipal Board, *Rules of Practice and Procedure* for the Ontario Municipal Board, Section 134.

³² *Tripp v. Ontario (Minister of Transportation)* (1999), 67 L.C.R. 161 at 167 and 168 (Ont. C.A.).

Practical Considerations for Ensuring the Fair Recovery of Costs

The considerations below are intended to assist claimants and respondents in optimizing their respective position on costs. The majority of these suggestions find their foundation in diligent record keeping or engaging in reasonable conduct and apply to claimants and respondents.

Practical Considerations for Claimants

The following should be considered in order for claimants to fairly recover their costs:

1. Have a retainer agreement signed at the time professional services are first engaged. Retainer agreements should include: (a) the scope of services to be rendered, (b) the names of the professionals or staff rendering services, (c) their respective chargeable rates, (d) the treatment of disbursements, (e) interest on unpaid accounts, (f) periodic changes in hourly rates, and (g) estimates of the hours required (if such an estimate is possible).³³ The initial retainer agreement can be complemented by periodic reports to clients and interim accounts, intended to keep the client aware of the hours billed, the hourly rates charged and any interest that may be accruing on the account.
2. Maintain accurate, detailed and contemporaneous timekeeping records or dockets, which describe the service performed and state the time spent. These records often become a critical element of demonstrating the reasonableness of the professional services for which recovery is sought. As Mr. Justice Southey stated in *Re Harper's Wholesale Ltd. and City of Hamilton*, "there is a responsibility on ... solicitors to keep sufficient records that they can

³³ See *The Law of Costs*, *supra* note 13 at 3-34 to 3-36.

demonstrate the fairness of the account they ultimately present”.³⁴ The importance of recordkeeping applies not only to lawyers, but to all professionals who seek reimbursement for their accounts. Inaccuracies, lack of particulars, ball park estimates, block time entries or claims for undocketed time are subject to a finding of being unreasonable and may result in portions of an account being unrecovered.³⁵

3. In addition to docket entries clearly delineating the scope and reasonableness of services rendered, it is often useful for professionals to maintain internal records, file notes and memoranda contemporaneously describing the services rendered. These records can include notes of telephone conversations and meetings that are held, as well as internal memoranda explaining why attention is being given to specific issues and the rationale for costs being incurred. By the time a costs assessment takes place in a complicated matter, the Assessment Officer may be evaluating the reasonableness of services rendered many years earlier, the rationale and support for which may be lost but for the existence of contemporaneous records.
4. Maintain an external written record justifying the necessity of services and expenses. This often entails a claimant seeking admissions on certain issues or potentially contested facts from the respondent before commissioning services that will increase the costs of advancing a claim. This is not to say that the claimant requires the respondent’s permission before engaging

³⁴ *Re Harper’s Wholesale Ltd. and City of Hamilton* (1978), 15 L.C.R. 9 at 10 (Ont. H.C.J.).

³⁵ *Airport Corporate Centre Inc. v. Minister of Transportation*, *supra* note 30 at 16 to 19.

services; rather, establishing a record to support the necessity of the service for which fees are charged provides reinforcement for the reasonableness of the service. Likewise, the reasonableness of obtaining independent assessments and confirmation of primary facts such as surveys, aerial photographs or environmental tests, will be supported if this information does not exist or if a respondent is not prepared to share this primary information with a claimant.

5. Attempts should be made to advance claims to their ultimate resolution with relative promptness.³⁶ It is inevitably the case that where a matter is drawn out over many years with intermittent periods of inactivity, the costs will increase and the duplication of services will occur. In all likelihood, when a claim is brought to a hearing five, ten or even twenty-five years after the expropriation takes place, the initial experts engaged in the matter may not be available to provide evidence at the hearing.

Practical Considerations for Respondents

A respondent can also take steps to manage and minimize a claimant's professional fees for which the respondent will ultimately be responsible. A number of these measures resemble those available to a claimant to ensure reasonableness and include the following:

³⁶ Delay to the advancement of a proceeding that results in additional costs can constitute grounds for reducing a costs award if the delay is found to have been caused by the party seeking costs or its solicitor: see discussion in *Bifolcki v. Sherar (Litigation Administrator of)* (1998), 38 O.R. (3d) 772 at 779 (C.A.) and *The Law of Costs*, *supra* note 19 at 3-45.

1. Contemporaneously document discussions, documentary exchanges and agreements with the claimant and/or its consultants, so the respondent maintains its own record of issues relevant to a costs assessment. It is often impossible at a costs assessment, frequently taking place many years after the claim began, to reconstruct all that went on and challenge the claimant's cost on this basis.
2. Attempt to resolve issues or obtain agreements on facts early in the litigation process so that efforts are not unnecessarily undertaken by the claimant to substantiate issues or facts that may not be contested at the hearing. Examples of resolving issues or facts early to reduce the costs of a proceeding include:
 - a. Arriving at an early resolution on the quantum of certain areas of loss or damages. If the respondent and the claimant are in substantial agreement about the market value of a property, or portions thereof, it may not be necessary for the claimant to expend considerable resources on expert analysis relating to the resolvable issue;
 - b. Agreeing on facts or issues that arise in the litigation. If the claimant and the respondent are in agreement on the highest and best use of a property, a detailed planning analysis may be avoidable or the scope of such an analysis may be reduced;
 - c. Narrowing or eliminating minor issues, which may cost more to litigate than the actual quantum of the amount claimed. There is little point in both parties going to great lengths to determine compensation

for fencing or trees removed from a property when these issues can be nipped in the bud by an early agreement; and

- d. Disclose the existence of and be prepared to share information containing objective and/or primary data which would not usually be contested even if this information may technically be subject to litigation privilege.³⁷ This information may include surveys, environmental test results, aerial photographs or geotechnical studies for which there is no need to have two separate versions independently created.
3. Make attempts to formally resolve potentially contested issues through admissions in the pleadings or by a Request to Admit, under Rule 51 of the *Rules of Civil Procedure*.³⁸ These requests for admissions often entrench a party in a position on an issue and require a formal denial or admission in the litigation process. If the respondent issues a Request to Admit and the facts are admitted by the claimant, it becomes difficult for the claimant to demonstrate the reasonableness of incurring costs relating to the admitted fact or issue, after the admission is made. Correspondingly, if the respondent seeks a factual admission and the claimant denies this fact, which is

³⁷ The production of privileged documents should be made with care in order to ensure that the production of certain documents does not amount to an “implied waiver of privilege” or “cherry-picking” that can result in privilege being lost over additional documents that would otherwise attract privilege: see discussion in *S. & K. Processors Ltd. v. Campbell Ave. Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 at 220 (S.C.).

³⁸ Rule 51 of the *Rules of Civil Procedure* is not incorporated into the *Rules of Practice and Procedure* for the Ontario Municipal Board. This Rule, however, can be incorporated into the procedure leading up to a hearing before the Ontario Municipal Board if it is included in a procedural order issued by the Board. It is rare that the Board will resist attempts by the parties to narrow issues, arrive at agreed facts and ultimately shorten a hearing.

ultimately established in the respondent's favour, the respondent can challenge the reasonableness of the claimant's costs relating to the denied fact or issue ultimately proven in favour of the respondent.³⁹

4. Ensure that contested claims are promptly advanced to resolution. Unlike in civil proceedings, a respondent can commence the litigation process by issuing a Notice of Arbitration, pursuant to sub-section 26(b) of the *Act* and Rule 126 of the *Rules of Practice and Procedure* of the Ontario Municipal Board.⁴⁰ The respondent can also assert a degree of control over the speed at which a proceeding is advanced by seeking a procedural order from the Board. In addition to serving the interests of justice, avoiding delay in a proceeding inevitably reduces the costs of both parties.
5. Consider costs strategies in the determination of the initial offer of compensation, pursuant to Section 25 of the *Expropriations Act*. Although an expropriating authority is only statutorily obligated to provide full compensation for the market value of the lands taken, providing additional compensation for what is reasonably considered injurious affection and disturbance damages can avoid matters advancing to formal litigation.⁴¹ In

³⁹ Rules 51.07, 57.01(1)(g) and 58.06(1)(g) of the *Rules of Civil Procedure* provide the Court and Assessment Officers with the discretion to consider in their determination of costs, "a party's denial of or refusal to admit anything that should have been admitted." This rule may ultimately factor into the Assessment Officer's consideration of the reasonableness of a cost claimed. See application of this rule in a civil matter in *Bakhtiari v. Axes Investments Inc.* (2004), 69 O.R. (3d) 671 (C.A.).

⁴⁰ See *Sleiman v. Windsor (City)*, [2002] O.M.B.D. 637 for a discussion addressing the ability of a Respondent to issue a Notice of Arbitration and advance an arbitration by moving for the Board to issue a procedural order.

⁴¹ Interestingly, the *Ontario Royal Commission Report* recommended (at page 1029) that expropriating authorities advance 100% of the "full amount of compensation as estimated by the expropriating authority" before taking possession. In its drafting of the *Expropriations Act*, the legislature, however, required that expropriating authorities pay only the "market value of the owner's lands" before taking possession.

certain instances, a reasonable and fulsome initial offer of compensation can motivate owners to accept full and final settlements and can deter owners from going forward with claims, as they risk having an ultimate award of compensation below the sum that triggers the entitlement to costs under Section 32 of the *Expropriations Act*.

Potential Legislative Changes on Costs in Expropriations

Certain elements of the regime for the recovery of costs may be modified to bring about a result that goes further to ensure that an expropriated owner is made whole and not over compensated as a result of an expropriation. The discussion below suggests potential amendments to the costs provisions of the *Expropriations Act* so that the statutory scheme for the recovery of costs ensures that the policy objectives for the recovery of costs are met.

Statutory Entitlement to Interest on Costs

In certain instances, namely, those where an individual with modest means is expropriated, the individual's right to professional assistance is tempered by the fact that the recovery of costs is only forthcoming at the resolution of the matter, although the professional fees are incurred well before that time. At times this fact denies owners access to the professional assistance they need or requires significant sacrifices from owners in order to obtain the assistance needed to make them whole. Moreover, the fact that costs are only paid when a matter resolves often places considerable pressure on an owner to have the issue of compensation resolved quickly, even if the resolution is for a

sum less than what the owner actually believes is full and fair compensation. In contested claims for compensation which take several years to resolve, the prejudice suffered by claimants and their consultants by not recovering costs incurred for several years can prove substantial.

The prejudice to an owner that results from only obtaining compensation for costs at the resolution of the matter could be reduced by providing a statutory entitlement to interest on the fees charged at a commercially competitive rate. Although the interest that has accrued on a professional's account can be characterized as a "reasonable cost" and this cost has been recovered in costs assessments,⁴² there is no clear entitlement to interest on costs under the *Expropriations Act*. The rate of interest payable on costs could be prescribed by statute or regulation and would also function as a limit to the rate of interest that could be recovered on an account.

The *Expropriations Act* provides for interest at a rate of six percent for certain elements of compensation, including market value.⁴³ Other heads of compensation, such as disturbance damages, do not attract interest.⁴⁴ The policy rationale for the payment of interest on certain areas of compensation under the *Act* is to provide compensation for the

⁴² See John A. Coates and Stephen F. Waqué, *New Law of Expropriation*, looseleaf ed. (Toronto: Thomson/Carswell) at 10-211; *Greenslade v. Minister of the Environment* (1982), 23 L.C.R. 289 (Ont. Taxing Officer), aff'd (1982), 25 L.C.R. 259 (H.C.J.), affirmed (1983), 26 L.C.R. 192 (C.A.); *Halifax (Regional Municipality) v. Turner Drake & Packers Ltd.* (1998), 64 L.C.R. 168 (N.S.C.A.). Sections 32 and 33 of the *Act* do not directly address interest payable on costs.

⁴³ *Expropriations Act*, *supra* note 2, Section 33.

⁴⁴ See *747926 Ontario Ltd. v. Wellington (County) Board of Education* (2001), 74 L.C.R. 241 at 252 (Ont.C.A.).

temporary loss of capital.⁴⁵ This underlying policy favours the recoverability of interest on costs paid by the owner.

Professionals would be given an incentive to enter into arrangements where they defer their recovery of costs until the expropriation is resolved if they were provided with a statutory entitlement to interest on their fees. In addition, owners who pay the fees of professionals as they are incurred would also be able to recover interest on these out-of-pocket expenses. The provision of interest would, therefore, provide greater access to justice for expropriated owners and would reduce the prejudice to parties who have to pay professional fees as they are incurred.

A statutory enactment providing interest on costs would benefit professionals by ensuring that a fair rate of interest is actually recoverable, while controlling the rate of interest payable to ensure that owners or expropriating authorities are not subject to potentially oppressive or unreasonable rates of interest being charged by consultants.⁴⁶

Additional Offers/Advances to be Considered in the “85% Rule”

At times, expropriating authorities make the economic decision to provide owners with compensation greater than what is believed to be the owner’s true entitlement under the *Expropriations Act*, only to avoid the significant additional expense of professional fees

⁴⁵ The Honourable John Morden, *Introduction to The Expropriations Act, 1968-9 (Ontario)* (Toronto: Canada Law Book, 1969) at 74.

⁴⁶ Rates of interest charged by professionals vary considerably. It is not unusual to see interest on certain professional accounts compound at a rate of 2.0% per month. Certain professionals are also constrained in their ability to charge commercially competitive rates of interest on unpaid accounts. An example of this is Section 33 of the *Solicitors Act*, R.S.O. 1990, c. S.15, which limits the rate of interest lawyers may charge and currently permits lawyers to charge no more than 2.8% per year on unpaid accounts.

of both the expropriating authority and the owner. This over-compensation often takes place in cases where the claim at issue is modest in comparison to the costs of taking the claim to adjudication and/or where an expropriating authority has limited concern about a detrimental precedent being set by the payment of compensation. Even though business decisions affect the outcome of virtually all facets of litigation, it does not appear to be the intention of the legislation to provide a premium to the compensation paid to owners simply because an expropriating authority does not wish to pay the owner's costs.⁴⁷

One potential means of reducing the prejudice to respondents caused by the significant cost of the litigation process is to amend Section 32 of the *Expropriations Act* to make the 85% Rule based on any without prejudice offers to advance funds by the expropriating authority. The 85% Rule would be based on the additional advance from the time the advance is made onward. Although decisions on this issue are not perfectly consistent, it appears that Courts and the Ontario Municipal Board have favoured the approach that the 85% Rule is based solely on the initial offer of compensation paid pursuant to Section 25 of the *Expropriations Act* and not on subsequent advances by the respondent to the claimant.⁴⁸

⁴⁷ *Law Reform Commission Report*, *supra* note 8 at 10.

⁴⁸ See e.g. *Jakubowski v. Ontario (Minister of Transportation and Communication)* (1973), 6 L.C.R. 29 at 44 (Ont. L.C.B.), appeal dismissed (1975), 9 L.C.R. 235 (C.A.); *Hewitt v. Ontario (Minister of Transportation and Communication)* (1985), 33 L.C.R. 194 at 199 to 201 (Ont. Assessment Officer); *New Law of Expropriation*, *supra* note 44 at 10-192 to 10-195; but see *Green-Life Ltd. v. Ontario (Ministry of Transport)* (2002), 77 L.C.R. 155 (O.M.B.) and *Bellwood v. Clearview (Town)* (1995), 54 L.C.R. 185 (O.M.B.).

The result of the present rule is that, so long as the owner can substantiate an entitlement for compensation greater than 85% of the initial offer, the expropriating authority is obligated to pay all reasonable costs. An authority should have the ability to make additional without prejudice advances, based on the merits of a case, the discovery of additional facts and opinions and the resolution of issues at any time during the proceeding. If a claimant fails to obtain an award of compensation exceeding 85% of the total funds advanced (or funds offered by the respondent on a without prejudice basis), the Board should have the discretion to reduce or deny a claimant's costs from the time the additional advance is made or offered onward.

This proposed rule would differ from the costs provisions under the *Rules of Civil Procedure*⁴⁹ and would still afford a claimant a low risk arbitration opportunity as:

1. The 85% Rule would be based on an actual advance of additional funds that could be accepted without prejudice, not on an offer of settlement that requires a release of all claims;
2. The claimant would not have to obtain compensation exceeding the without prejudice offer to advance funds; rather, the claimant need only achieve an award exceeding 85% of the offer;
3. The Board would retain the discretion on how costs should be awarded and the failure by a claimant to meet the 85% Rule would not necessarily result in an adverse cost award; and

⁴⁹ Rule 49.10 of the *Rules of Civil Procedure* provides costs in favour of a party who makes a formal offer of settlement and goes on to achieve a more favourable result at trial.

4. A claimant would still enjoy full indemnity for costs for all reasonable costs incurred prior to the subsequent advance of funds, even if the claimant cannot meet the 85% Rule, based on the subsequent advance.

This proposed amendment would not only give expropriating authorities greater flexibility in reducing their exposure to costs, but would also give expropriating authorities an incentive to make further without prejudice advances to claimants, as it becomes clear through the compensation process that such advances are warranted. Accordingly, this amendment would benefit claimants by encouraging without prejudice partial payments for compensation owing prior to the ultimate resolution of the claim.

Entitlement to Costs in the Absence of a Hearing

In practice, the vast majority of claims for compensation in the expropriation process do not culminate in a hearing before the Ontario Municipal Board; rather, they are settled before a hearing takes place. Moreover, a large number of claims arising from expropriations are resolved before the issuance of a Notice of Arbitration. It is not an unusual occurrence to have the issue of compensation resolved in a taking under the compulsion of expropriation before the Plan of Expropriation is even registered. The *Law Reform Commission Report* addressed the issue of costs in the instance of a settlement as follows:

Furthermore [the owner] should be entitled to these costs whether or not his claim went to arbitration. Merely because he settles is no reason why he should be out-of-pocket.⁵⁰

⁵⁰ *Law Reform Commission Report*, *supra* note 8 at 39.

In spite of this statement and the reality that the majority of expropriation matters settle, Section 32 of the *Expropriations Act*, if read literally, only specifically recognizes a claimant's entitlement to costs at the resolution of a hearing. The rationale for this apparent gap in the legislation may be that parties to a settlement are free to define their own terms of agreement on compensation. In the majority of settlements the claimant and the respondent agree to compensation for costs in the settlement agreement that resolves the dispute, or incorporate the claimant's costs into the final payment of compensation.

Settlement agreements providing for the claimant's recovery of costs are made on the understanding that if the matter did not settle the claimant would be entitled to its costs following an arbitration before the Ontario Municipal Board. A common occurrence in settlements is that the parties agree to the quantum of the initial settlement and leave the issue of costs to be resolved at a later date, either by agreement or at a costs assessment. However, ambiguity exists as to how a settled matter is referred to a costs assessment.

What remains uncertain is the jurisdiction of the Ontario Municipal Board to refer the matter to an Assessment Officer of the Superior Court of Justice when no actual hearing has taken place. It has been suggested that a costs assessment following a settlement ought to be requested by the respondent pursuant to Section 9 of the *Solicitors Act*.⁵¹ An assessment of costs referred to an Assessment Officer under the *Solicitors Act*, as

⁵¹ *Re Harper's Wholesale and City of Hamilton* (1980), 19 L.C.R. 210 (Ont. Tax. Off.). In this decision, Taxing Officer McBride made a statement in *obiter dicta* on his view that parties to a settlement should have the matter referred to assessment under the *Solicitors Act*.

opposed to being referred by the Ontario Municipal Board under the *Expropriations Act*, may prejudice a claimant for the following reasons:

1. The claimant does not automatically have party status to the costs assessment, as the assessment is ordered between the professional and the third party responsible for payment (the respondent);
2. The claimant does not have the same degree of control over the timing or process by which costs are assessed and an award of costs given;
3. The Assessment Officer who hears an assessment arising from an expropriation referred under the *Solicitors Act* may question his or her jurisdiction to determine and assess the accounts of professionals other than lawyers; and
4. The costs scale appropriate for expropriation matters, set out in sub-section 1(2) of the regulations under the *Expropriations Act*⁵² may not necessarily apply if the matter is not referred by the Ontario Municipal Board pursuant to the *Act*.

This very question was recently adjudicated before the Ontario Municipal Board in *Marshall v. Ontario*.⁵³ This decision came before the Ontario Municipal Board on a motion brought by the claimant following a settlement agreement being signed by the parties. Mr. Marshall sought to have his costs referred to an Assessment Officer by the Ontario Municipal Board. The Ministry, however, refused the Claimant's request and wished to have the matter referred pursuant to Section 9 of the *Solicitors Act*. As the

⁵² *Expropriations Act* regulations, *supra* note 16.

⁵³ *Marshall v. Ontario (Minister of Transportation)*, *supra* note 12.

matter of costs remained outstanding, the Claimant issued a Notice of Arbitration and Statement of Claim, seeking only compensation for his costs, as all other elements of compensation had been resolved. The Claimant then sought an order from the Board referring the matter to a costs assessment, based on the undisputed agreement that costs in this matter be paid, pursuant to sub-section 32(1) of the *Expropriations Act*.

The Board ruled in Mr. Marshall's favour and referred the matter to an assessment for the following reasons:

1. The matter before the Board arose from an expropriation, a Plan of Expropriation was registered, notices were given under the *Expropriations Act*, the matter proceeded to the Board of Negotiation and, at all times, the Ministry attorned to the jurisdiction of the *Expropriations Act*. A Notice of Arbitration was subsequently issued and a Reply delivered. As such, the Board found that it had the jurisdiction under sub-section 29(1) of the *Expropriations Act* to determine compensation on this matter, and invoke its powers under Section 32 of the *Expropriations Act*.
2. The Board expressly recognized that a Claimant's entitlement to reimbursement for costs is an element of compensation owing under the *Expropriations Act*.
3. The Board was not satisfied with any explanation as to why the *Solicitors Act* would have any relevance in the matter and stated that it was abundantly clear that the costs incurred arose from the proceedings in the context of an expropriation and not from a dispute between a solicitor and client.

4. By issuing a Notice of Arbitration, the Claimant had triggered the jurisdiction of the Ontario Municipal Board, pursuant to Sections 26 and 29 of the *Expropriations Act*. The jurisdiction of the Board and application of the *Expropriations Act* prevails over any other legislation (including the *Solicitors Act*) relating to expropriation issues.⁵⁴

The issue of the Board's jurisdiction to award costs in a settlement after an expropriation takes place has been clarified by the *Marshall* decision. It is not clear, however, whether the Board would have similar jurisdiction in an instance where the provisions of the *Expropriations Act* are triggered and expropriating proceedings commenced but the matter settles before a Plan of Expropriation is registered. A similar ambiguity exists if an expropriating authority acquires property under the compulsion of expropriation, but before formal expropriation proceedings are commenced the parties enter into a settlement/property purchase agreement that recognizes an owner's entitlement to costs, as if an expropriation has taken place.

The situations above arise in instances where a public authority exercises its powers of expropriation and requires a person to part with property under the threat of expropriation. The policy considerations for owners being entitled to their reasonable costs applies to property owners having to part with their property through a compulsory taking and does not appear to hinge on whether the property was formally expropriated, the jurisdiction of the Ontario Municipal Board triggered or a hearing before the Board

⁵⁴ Section 2(4) of the *Expropriations Act* states that where there is a conflict between the provision of the *Expropriations Act* and another general or specific act, the provision of the *Expropriations Act* prevails.

completed.⁵⁵ An amendment to the *Expropriations Act* addressing the means by which a party can obtain its costs following a settlement or property purchase agreement under compulsion of expropriation would resolve this ambiguity and ensure a more consistent means for the resolution of costs issues. Such an amendment would also provide parties with greater certainty about their ultimate compensation, thereby encouraging parties to seek professional assistance and enter into reasonable settlements.

In the absence of a legislative change, one possible solution to the problem discussed above is to recognize in the settlement agreement the Board's jurisdiction to direct the matter to a costs assessment if the parties are unable to agree on the quantum of costs. If the respondent and the claimant consent to the jurisdiction of the Board, pursuant to Sections 24 or 30 of the *Expropriations Act*, to refer the matter to a costs assessment, the Board has the jurisdiction to make such an order whether a Plan of Expropriation is registered or not.⁵⁶

Conclusion

In all facets of litigation or dispute resolution, the issue of costs presents a necessary evil and can potentially detract from a party's right to access justice and achieve a fair resolution to the dispute. In the context of expropriation, the legislature recognizes the importance of dispossessed landowners having the right to a fair resolution and to have

⁵⁵ *Law Reform Commission Report, supra* note 8 at 39.

⁵⁶ In the decision of *Ontario (Minister of Transportation) v. 1223578 Ontario Ltd.* (2002), 78 L.C.R. 241 (O.M.B.), Board Member Jackson found that the Board has jurisdiction under Section 30 of the *Act* if the owner consents to lands being acquired by a statutory authority, either party applies to the Board and the other party consents to the application.

access to professional assistance to ensure a fair resolution. Consequently, the legislature has attempted to provide owners with the assurance of substantial recovery for their reasonable costs.

The statutory scheme to bring about this recovery should ensure fair and consistent treatment for all expropriated owners by encouraging access to professional advice for all owners and treating those who settle early in the expropriation process in a similar way to those who proceed into formal litigation. In addition, the *Expropriations Act* should balance a claimant's entitlement to costs with the needs of a respondent to have some degree of control over its costs exposure.

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